IN THE

SUPREME COURT OF THE UNITED STATES.

No. 185.

GEO. S. WHITAKER AND MARY L. WHITAKER,
PLAINTIFFS IN ERROR,

v.

THOMAS McBRIDE AND WILLIAM H. KILGORE,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

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The question in this case is whether the purchaser from the Government of part of an island has become by such purchase the owner of the *next island*, which he did not purchase or intend to purchase, and which the Government did not sell or intend to sell to him. While the question might seem to imply a negative answer, and did receive such an answer from the district court of the county in which the case was tried, yet the Nebraska supreme court has answered it in the affirmative.

The property rights of the plaintiffs in error originated under the act of Congress of July 21, 1876 (U. S. Statutes at Large, vol. 19, page 94), and the United States homestead laws. When this act was passed, and for two or three years before that time, many persons were living upon the Fort Kearney military reservation, being the tract of land referred to in the act. Many other persons were expected to settle upon this reservation. IT WAS CONSIDERED BY THE SETTLERS THEMSELVES THAT THE MAN WHO SETTLED SHOULD BE PROTECTED IN HIS SETTLEMENT, ALTHOUGH THE LAND HAD NOT YET BEEN SURVEYED AND OFFERED FOR SALE. CONGRESS ADOPTED THIS VIEW AND PASSED THE ACT IN QUESTION.

The island in controversy is part of the said Fort Kearney military reservation. The act passed authorized the Secretary of the Interior to cause said tract of land to be surveyed and offered to actual settlers only at minimum price and in accordance with the provisions of the homestead laws, and if any person, being an actual settler and having exhausted his right to make a homestead entry, has made permanent improvements upon said land, such person or his heirs may enter one-quarter section under the pre-emption law and the heirs of every deceased person who made settlement prior to June 1, 1876, make complete the pre-emption or homestead entry of the person deceased. There is an exact copy of the act on page 37 of our first brief. Here we have undertaken to give the substance.

THE ISLAND IN DISPUTE WAS NEVER SURVEYED. MANY OTHER ISLANDS IN THE SAME RESERVATION AND IN THE SAME VICINITY HAVE NOT BEEN SURVEYED. The Government surveyors seem to have had a horror of wet feet. At any rate, they did not spend much time surveying islands in the Fort Kearney military reservation. There would be a few lots surveyed and sold, and then the purchasers would fence up everything in sight. OF COURSE THEY FENCED UP THE ISLANDS THEY DID NOT BUY ALONG WITH WHAT THEY ACTUALLY BOUGHT. The defendant in error Kilgore was one of

these. McBride is his servant and ally. Ostensibly McBride and Kilgore were arrayed against each other. Even in the Nebraska supreme court they were still filing separate briefs. HERE FOR THE FIRST TIME THEY UNITE IN A JOINT BRIEF.

Whitaker, the plaintiff in error, came along looking for a homestead. This was in April, 1897. When he learned that Kilgore had fenced in a number of these unsurveyed islands, which he did not own and which belonged to the Government, and that Kilgore and McBride were claiming the island in question without owning it, and that the island actually belonged to the United States and was subject to settlement as a part of the public domain, *he stopped and proceeded to build a house for the wife and children on this particular island.* Up to date he has been unable to get the Land Department of the United States to give him a homestead receipt. IT CANNOT DO SO IN ANY EVENT UNTIL THE LAND IS SURVEYED, BUT WHITAKER IS WILLING TO PAY THE EXPENSE OF A SURVEY, AND WHENEVER THIS COURT SAYS THAT WHITAKER WAS AUTHORIZED TO MAKE SETTLEMENT UNDER THE ACT OF CONGRESS OF JULY 21, 1876, OR THAT MCBRIDE AND KILGORE CANNOT MAINTAIN THEIR ACTION AGAINST HIM WITHOUT OWNING TITLE TO THE LAND AND RECOVERING UPON THE STRENGTH OF THEIR OWN TITLE, THEN THE LAND DEPARTMENT WILL ORDER A SURVEY.

What Whitaker wants is simply a fair apportionment of the public domain *which shall recognize his right along with the other settlers who went on the Fort Kearney reservation.* On June 27, 1898, McBride filed his petition in the district court of Buffalo county against the plaintiffs in error in this case, Geo. W. Whitaker and his wife, and against Kilgore and his wife. He alleged the island was unsurveyed, but claimed it to be a part of his lots, 8 in section 12, and 5 in section 13, but separated from the main body of the land comprising said lots by a narrow channel of the Platte river, known as Mosquito channel, but all constituting the riparian accretion

to said lots. As to Whitaker and his wife, he alleged that they were wrongfully claiming to own the premises as their own, and as to Kilgore and his wife he alleged that they claimed an interest as a riparian accretion "to land owned by them lying immediately north of said island" (printed Record, page 2). Kilgore claimed ownership of the island by accretion to his lots (printed Record, page 5). Whitaker and wife answered, no jurisdiction of subject-matter, no case in equity; that plaintiff has an adequate remedy at law; that Whitaker is of lawful age, the head of a family, and a citizen of the United States and of the State of Nebraska; that he had never used his homestead-right, entry upon the island to acquire it as a homestead, and that no part of the lots acquired by McBride and Kilgore was acquired by accretion or reliction, island never entered upon or settled upon and proved up on ownership of the United States, and right of occupancy of defendant Whitaker (printed Record, pages 7, 8, 9, and 10).

The taking of evidence was finished in February, 1899. FOUR MONTHS AFTERWARD, AND JUST BEFORE THE COURT FILED ITS JUDGMENT, MCBRIDE AMENDED HIS PETITION AND KILGORE AMENDED HIS CROSS-BILL. McBride amended so as to state a *new ground of ownership*. In his former petition he alleged "riparian accretion" to his lots. In the amended petition he said there was formed in Mosquito channel "A low wet island or middle ground, which in dry times and low stage of water in the Platte river separates the said Mosquito channel into two streams or channels which unite both above and below the said island or middle ground." Here is a seeming attempt to show that the Mosquito channel ordinarily covered the island and that it *only rose out of the channel and divided the stream in a dry time. There is absolutely no testimony to justify this contention. The testimony is all contained in the printed record and shows that this island was as high as any other island in the vicinity.* While the case was not tried on this issue, the island in question is

quite as high as the lots which are a part of islands on either side of it. By reason of the fact that water is taken out of the Platte river for irrigation purposes in Colorado and Nebraska, there is not quite so much water at the time of the June rise, but there never were any floods as high up the Platte river as the location of this island. The island in question has always been suitable for agriculture since before the survey was made in the spring of 1877.

It was also alleged in the said amended petition that the said McBride was the grantee of the Government of the United States, which granted him lot 8, in section 12, and lot 5, in section 13, without any reservation, and the said McBride alleged that by virtue of said grant he took to the center of the thread of the stream of said Mosquito channel. Said new petition also alleged that the Government had granted to the defendant Kilgore lots 6 and 7, in section 12, and lot 2, in section 13, without any reservation of said island or middle ground, so that the bed of the said Mosquito channel and the island therein and middle ground thereof are owned by the plaintiff McBride and the defendant Kilgore. This allegation is not supported by the evidence for the reason that the plat shows that McBride and Kilgore each own fractional lots, which extend down to the channels of two streams. One channel skirts along the *south side* of the island in controversy, and the plat shows that McBride's island goes up to the edge of this channel, or to the center of it, as the law may be. The other channel is shown by the plat to skirt along the *north side* of the island in controversy and on the *south side* of the lots belonging to Kilgore's lots 6 and 7. Nor is there any testimony in the case which shows that Kilgore had a less number of acres than he purchased or that McBride had a less number of acres than he purchased.

It was also alleged in this new answer "that the meander line, as shown by the field-notes and map of said Government survey, do not coincide with the banks of said Mos-

quito channel as they now exist, and there exists a controversy between the plaintiff and defendant Kilgore as to where the said boundary line should be located," and there is no testimony which tends to show that there has been any change in the banks of "Mosquito channel."

The next paragraph in this amended petition alleges that the island has become drier by reason of the damming of channels further up the stream and subsidence and recession of the waters of the Platte river. This statement is undoubtedly true for the reason that there is less water in the Platte river because of irrigation than there used to be, *but the Platte river has never been subject to overflows at Kearney or anywhere in the vicinity of this island, and the island has always been valuable for pasture and never too wet for agriculture.* In this same paragraph it is alleged that Whitaker moved from the island about the 1st of April, 1897, but it is claimed that he and his wife have no right, "title, or claim of any kind to said land and are mere trespassers."

To this we say that they cannot be trespassers as to McBride and Kilgore, because McBride and Kilgore do not own the land. As it was never surveyed and was above 21 acres and ought to have been surveyed, it could not be sold to any one and McBride and Kilgore did not buy it or any part of it. Nor is there any pretense that they recover upon the strength of their own title. As to whether Whitaker and his wife are trespassers, so far as the United States is concerned, depends upon the *construction* to be given the local act, which *authorized the settlement* of the Fort Kearney reservation *and its survey and sale.* If that act was passed to encourage settlement, then Whitaker and his wife *rightfully settled upon the land,* but whether McBride and Kilgore *can put them off depends upon whether they own the land.* Whether the United States wants Whitaker and his wife to move off the land is not suggested or discussed in any way by our friends. *It is one of our contentions that when the United States wants Whitaker and his wife to move off the land that it will notify them of that fact.*

Kilgore's answer is along the same line as the petition of McBride.

Kilgore alleges in the fourth paragraph of his answer "That the meander line of said river is along the north bank, as indicated by the field notes and map does not coincide with the actual lines of said north bank, as it now exists, but cross said bank and include in the boundaries of said lot a large part of said island or middle ground." *To this we say that Kilgore can in no event claim beyond the center of the first channel next to his lots, and it is wholly immaterial where the meander line of Kilgore's lots may be. In any event, it only points to the actual channel and cannot go beyond it.* The same is true of the meander line of McBride's lot. In no event can such meander line indicate a boundary of McBride's lots north of the stream on which said lots abut. Where there is a natural division, that is the boundary. *If it is a stream that is the natural division, then the meander line points to it.* The meander line *points* to the natural *boundary where there is a natural boundary* and is made to estimate the surface of the land from (Sphung *v.* Moore, 120 Ind., 356).

It is in the testimony in this case and in the pleadings, and it is conceded by everybody, that the island was not surveyed. *This being the case, meander lines made at the time of the survey of the lots sold were made to indicate the boundaries of those lots or to point to them. They were not made for the island in question, for the island was not surveyed.*

On the 13th day of June, 1899, the district court of Buffalo county, Nebraska, rendered its judgment dismissing the said petition of the plaintiff McBride and the cross-petition of the said defendant Kilgore, and declared that the said McBride and the said Kilgore had no cause of action against the Whitakers. The material findings of fact in said judgment of the district court are based upon the evidence and are fully established by it. Among other of the findings of the said district court was the finding that the island con-

tained about 22 acres (it is really nearly 48), and was "entirely surrounded by certain channels of the Platte river."

This last finding shows that the land cultivated was really an island, and that it was not submerged and had no intangible and fleeting character. The next finding is along the same line. "The court further finds that said channels bordering said tract in dispute, the one being on the south of lots 6 and 7 and the other on the *north of lot 8, are substantially the same now as they were at the time the original survey was made, and that said channels are substantially as shown by the plaintiff's plat marked Exhibit 'A.'" This finding is important, because it shows that the channels are the same now as at the original survey* (printed Record, page 17).

The court further finds that the *south line* of said lots 6 and 7 is the channel line, as shown in Exhibit A, and that the *north line* of said lot 8 is the channel bounding it on the north, as shown in said Exhibit "A." *This finding clearly establishes the boundaries of the lots claimed by McBride and Kilgore respectively, and shows that those lots do not extend to the island and include any part of it.*

Up to this point the Nebraska supreme court makes no finding different from that made by the district court of Buffalo county. The next finding made by the district court of Buffalo county is seemingly agreed to by the supreme court. It is: "THAT SAID ISLAND SHOULD HAVE BEEN SURVEYED BY THE GOVERNMENT SURVEYORS; THAT IT WAS A NEGLECT OF DUTY ON THEIR PART TO NOT SURVEY THE SAME; THAT THE TITLE TO SAID ISLAND STILL REMAINS IN THE UNITED STATES; THAT IT WAS NEVER THE INTENTION OF THE GOVERNMENT AT THE TIME IT GAVE ITS PATENT TO SAID LOTS 6 AND 7 TO CONVEY ANY PART OF THE ISLAND, NOR WAS IT THE INTENTION OF THE GOVERNMENT TO CONVEY IT TO THE PATENTEE OF LOT 8; THAT THE ONLY INTEREST THE DEFENDANT WHITAKER HAS IN THE SAID LAND IS THAT HE CLAIMS THE RIGHT TO ENTER THE SAME AS A HOMESTEAD, AND THAT HIS RIGHT IS ONLY WHAT POSSESSION WOULD

GIVE HIM, AND THAT HE HAS NO TITLE THERETO." The number of acres found in the island made it the duty of the Government surveyors to survey it. That *their neglect* to survey it should *confer rights* upon McBride and Kilgore that they would otherwise *not have had would seem strange*. That the neglect of an officer to perform his duty should deprive the United States Government of the possession of property which it owned, and should *transfer that possession to those who do not own it, would also seem very strange*. The finding that title of the island remains in the United States and that it was never the intention of the Government to convey the island to the patentees of lots 6, 7, and 8 is seemingly conclusive of the rights of defendants in error, unless there is some good legal reason apparent from the record why they should recover. THEY DO NOT CONTEST THE FACT THAT THE TITLE IS YET IN THE UNITED STATES. The learned commissioner of the supreme court of the State of Nebraska, who wrote the opinion, states: "Should the Government at any time hereafter desire to open this question, and to claim this island for itself, or for any grantee, no judgment which this court could enter in this case could in any manner prejudice its rights, as its title to this island could not be affected by proceedings in a case to which it is not a party" (printed Record, page 87). Later in the opinion he says: "As the question of the *rights of the State* has not been presented in this case, we reserve that question until a case arises in which we may have the benefit of the argument of counsel, it being one of too much importance to be determined without a full discussion" (printed Record, page 94). From these statements it will be seen that the learned commissioner of the Nebraska supreme court nowhere controverts the ownership of the United States Government and its right to assert title.

Before the passage of the act of July, 1876, the United States Government owned all the islands in the Platte river

within the Fort Kearney military reservation. It owned the land under the water in the channels. *If it sold one island it could only have sold to the center of the channels surrounding that island. Therefore, when it sold one island it would own the next island and to the center of the channels surrounding that island. As the United States Government never sold the island in controversy, it owns all round it to the center of the channels, does it not?*

There is no conflict whatever between the survey and the law. The survey is *no survey* so far as the island in controversy is concerned. It is a false survey as to the meander line bounding the lots owned by McBride and Kilgore, but as these meander lines simply *point to natural streams bordering on those lots, there is no conflict.* The survey and the law *both point* to the center of the channel, the *first channel next* to Kilgore's lot, as his boundary, and point to the center of the channel next to McBride's lot as his boundary, and *neither* of the meander lines *points to the island as a part of the lots in question because that would be against the rule and against the law. The island was never surveyed.* It is as much entitled to a survey as any *other island. When it is surveyed it may have meander lines.* As yet it has none because none have been established for it.

I.

Our friends upon the other side contend that as the Platte river is unnavigable that the rule of the common law is in force as to any riparian owner, and that the riparian owner owns to the center of the channel. In support of this contention they cite Grand Rapids and Indiana Railroad Co. *v.* Butler, 159 U. S., 86; the opinion of the supreme court of Michigan in the same case, 85 Mich., 246; Wiggenhorn *v.* Kountz, 23 Neb., 690; Clark *v.* Cambridge Arapahoe Ir. Co., 45 Neb., 798; Jefferies *v.* East Omaha Land Co., 134 U. S., 178; Hardin *v.* Jordan, 140 U. S., 371; John C.

Christenson, 25 L. D., 413; Dederick C. Glissman, 25 L. D., 474, and they also refer to the exhibits in this case, B and C, pages 75 and 76 of the printed record. Counsel for defendants in error quote at length from the opinion of the learned chief justice of this court in the case first cited. They also quote from the opinion of Justice Maxwell in the Nebraska case which they cite, and they copy his quotation from Ingerhan *v.* Wilkinson, 4th Pick., 373, and they close their argument by quoting points from the syllabus of the Nebraska opinion in this particular case.

We do not quarrel with the principle declared in the cases cited that the riparian owner of shore lands coming *down to the river* owns to the center or thread of the stream. We have no quarrel (for it is undoubtedly the law) except to say *that the doctrine does not apply where one islander seeks to appropriate the island next to his island.* By purchasing one island or part of an island from the Government, why should the purchaser contend that because of such purchase he has also become the owner of the *next island?* This is a question presented to the Nebraska supreme court, upon which it has maintained a most profound silence. This silence would seem to be explained only upon the ground that the author of the opinion believed that he was writing about a claim based upon "the grant of the *shore lands*" (printed Record, page 86); "that the island was one which was not to be surveyed under the instructions from the Land Department, and that it passed by a grant made by the Government of the *shore lands* lying opposite" (printed Record, page 86). The opinion speaks of the lots owned by McBride and Kilgore *as shore lands.* THE SHORE LANDS OF A RIVER ARE THOSE WHICH COME DOWN TO IT FROM THE OUTSIDE. This being so, the purchaser of part of an island has not necessarily bought a *whole island three-quarters of a mile long in the vicinity of the lot or lots which he purchased on another island.* We think that the principle

of riparian right if applied in this case *must result in leaving Whitaker in possession of the land.* If McBride and Kilgore are to be considered as *shore* owners instead of *island* owners, then each of them owns to the center of the channel *next to his lots. That being true, he has no claim of any kind on the island occupied by Whitaker.* McBride will own to the center of the channel immediately *north* of his lots, and Kilgore will own to the center of the channel immediately *south* of his lots. Whitaker will be left in possession of the island and will own the land under the water to the *center of each* of *the streams which together surround his island.*

When the writer sees a juggler toss balls or knives in the air, he is never certain of the number of balls or knives. This is probably a common experience. The idea is suggested that it may have been this sort of thing with which our friends upon the other side confused the learned supreme court commissioner who wrote the Nebraska opinion. THEY CALLED TWO THINGS BY ONE NAME. Of course, calling them by one name did not change the fact. *They were still two things.* But no one may be quite certain that he is able to successfully resist the effect of repetition. The harmless story-teller found in every neighborhood in time believes that he actually had the adventures which he relates. There are a great many channels of the Platte river. *Two of these channels surround the island in question. Each channel* is about three-quarters of a mile long. The one on the south side of the island is nearly straight, as shown by the plat. The one on the *north* side is in the shape of a bow, and is therefore a little longer. Just before leaving the southeast quarter of section 12 it forks. The *north* fork goes on the north side of *another island,* while the *south* fork joins with the stream that has run on the *south side of the island in controversy,* and in a few rods they again separate and surround Park island, which is also shown on the plat. Kilgore is invoking the doctrine of riparian rights to hold *these islands also.* Our friends have spoken and written of the channels of the river by

which the island in controversy is surrounded *as if they were one channel instead of two.* They have spoken and written of "Mosquito channel." As language is used, that *just means one, one channel.* They have never any place in the pleadings or in their briefs said anything about the MOSQUITO CHANNELS. "Mosquito channel" occurs once on the second page of their brief, three times on the fourth page, four times on the fifth page, once on the sixth, twice on the eighth, and three times on the ninth page. THEY NEVER WRITE IT IN THE PLURAL.

By looking at the map in the printed record between pages 74 and 75 the court will *see two distinct streams or channels beginning down in section 13 coming up northeast through section 12 and going over into section 7 in the next township.*

In the testimony the witness Swinyer describes TWO distinct channels (printed Record, page 57). When Swinyer was asked to describe "Mosquito channel east of the island in dispute" he says that *there are four channels there* (printed Record, page 57). The *two channels* which *go around the island* he describes as having the *same width* (printed Record, page 57). These two streams enclose and entirely surround an island which is shown by the plat to extend into *three different sections*, and they cross *the section line* and go into *another township from that in which it starts.*

As we understand the rule, the right obtained by becoming the owner of the bank can in any event only extend to the *center of the channel next to the bank*, and never results in the first instance in the extension of a line marking the boundary of a Government subdivision *until such line crosses a stream. The riparian right extends no line bounding a Government subdivision so that the same crosses either a stream or an island.* An island lying within an extension of such lines, but not touching them and not being longer than the width of the Government subdivision, may sometimes be properly included. In the case of The Indiana and Grand Rapids Railroad Co. *v.* Butler, *supra*, the island al-

leged to have been unsurveyed was at the time of the original survey a *mere speck of sand bar covered with water most of the year.* At the time of the second survey, when it was actually surveyed, it contained only 2.56 acres.

As it was only a speck of sand bar at the time of the first survey and was covered with water most of the time, it is fair to presume that because of its extreme insignificance the Government did not intend to assert title to it. When the General Government created the State of Michigan, it surrendered to the State its ownership to the bed of the river. It therefore made it possible for the State to extend the right of the riparian owner under the water to the center of the channel, even though the river was navigable. (In Michigan the riparian owner owns the land under the water to the center of the stream in a navigable river, as well as where the stream is not navigable.) If an island arose in the bed of the stream *after* the creation of the State, it would seem to belong to the riparian owner, in accordance with the rule in Michigan. It would not belong to the United States, *because not in existence when the survey was made and not in existence when the State was created.* That particular island was only a speck of sand bar at the time of survey, and it was covered with water most of the year, and because of *its diminutive size it was within the extended lines of a Government subdivision.* There was no need to cross a stream with an extension of these lines to get that little island in Michigan. But in the case at bar these TWO STREAMS ENCLOSE AN ISLAND WHICH IS SHOWN *by the plat to extend into three different sections, and it goes over a section line into another township than that in which it starts.* THIS ISLAND IS FULL THREE-QUARTERS OF A MILE LONG AND ITS PRODUCTIVENESS SUFFICIENT TO GUARANTEE THE AMPLE SUPPORT OF A LARGE FAMILY. The land is probably worth 40 to 50 dollars per acre. The Government may well be supposed to *desire to assert* its right to an island like this, which has had its existence in its present form perhaps for a century or more, when it would be quite in-

different to a speck of sand bar covered by water most of the year and which had *not yet grown* to the dignity of an island at the time of the survey. THE POLICY OF THE GOVERNMENT IS TO APPORTION ITS PUBLIC LANDS AMONG THE PEOPLE.

II.

The practical question presented by the case is, " Does the Government wish to permit the purchaser of part of an island to gobble up all the islands in the vicinity "? *McBride and Kilgore each own a part of separate and distinct islands, and by virtue of such ownership they seek to appropriate and divide between themselves another whole island, which is entirely separate and distinct from the separate islands in which they respectively own lots and which island begins above their lots and extends down below them.* If the owner of part of one island, sold to him or to his grantors by the United States, can become by such sale the owner of all of the next island, which has not been sold to him or his grantor and which the United States still owns, then it is difficult to understand why the mere audacity of such a claimant may not rise to a Napoleonic ambition and claim all the unsold islands in the vicinity. That is just what Kilgore has done. He is one of the early cattlemen in Nebraska and he has fenced up most of the islands in his vicinity and hopes to be enabled by the decision rendered in this case to permanently keep them. This is the *first island* which he asks this court to declare belongs to him and his assistant in the plan, McBride. *This is a test case and a considerable number of other prospective homesteaders and actual settlers are waiting to see the result.*

III.

On page 18 of their brief, counsel for defendants in error meet us with two propositions:

"First. This court has no jurisdiction of this case for the reason that no Federal question is involved therein.

"2. The decision of the supreme court of the State of Nebraska is in accordance with the laws of the United States upon the questions involved."

We dispute both propositions. The rights of plaintiff in error depend upon the construction of the act of Congress relating to the settlement and sale of the "Fort Kearney military reservation" (chapter 220, vol. 19, U. S. Stat. at Large, page 94), and also the homestead laws of the United States. *This court is the court of last resort whenever a United States statute is to be construed or an authority exercised under the United States is to be judicially considered.*

The contention of our adversaries would seem to be in effect that it was necessary to plead the law, and they say this was not done. *To this we say that they themselves pleaded the law and the particular act in question, and we have agreed with them, as we necessarily must, because the rights of our clients depend upon this law.* We will say, however, that, as we understand it, the court will take judicial cognizance of what the law is, and that it is never necessary to plead it in any jurisdiction in which the law is in force. *The facts are and the record shows that the plaintiff pleaded the particular act upon which the Whitakers rely.* The act of Congress of July 21, 1876, is contained in the 19th United States Statutes at Large, page 94, and the effect of that act and the rights of the parties under it have been discussed at the several sessions of the district court and numerous sessions of the State supreme court ever since the case began, and now the discussion goes on in this court.

Counsel for the defendant in error complain that "there

is no reference made to this statute in the decision, the pleadings, nor the evidence." They say: "This statute was interpolated or attempted to be interpolated in this case for the first time in the petition for the writ of error" (Brief of Defendant in Error, page 19). To this we say: (1.) *That the land was included in the Fort Kearney reservation, and would still be there but for the particular act in question. All parties were forced to consider the act of Congress which legalized settlement upon the reservation and opened it up for survey and sale. McBride and Kilgore both relied upon it, as did also Whitaker. Neither may have any right which is not acquired under it.* (a.) The first defense of the Whitakers is "that this court, the district court of Buffalo county, has no jurisdiction of the subject-matter involved in this case" (printed Record, page 7). Under this defense it was argued that the act in question *conferred no rights upon the State court to assume jurisdiction, and that to render a decision ousting the Whitakers from the island was to invade the province of the Land Department of the United States, and to oust the Federal courts of the jurisdiction conferred by law and to usurp their functions.* It was urged by the Whitakers that the island was no part of the lots belonging to McBride and Kilgore by either accretion or reliction, and that they were in possession, and that the husband, Geo. S. Whitaker, had not exhausted his homestead right and was on the land to make a homestead entry (printed Record, page 8). (*b.*) *The amended petition of McBride, in the very first paragraph, refers to this particular act.* He claims by virtue of a survey, "PARTICULARLY UNDER THE ACT OF CONGRESS RELATING TO THE SURVEY AND ENTRY OF THE FORT KEARNEY MILITARY RESERVATION" (printed Record, page 12). (c.) The finding of the district court is along this line, except that that court declares the fact according to the evidence, that no survey of the meander lines was actually made (printed Record, pages 16, 17, and 18). This does not dispute McBride's allegation concerning his ownership of lot 8, but the conclusion of the court as

to the law is contrary to McBride's conclusion of what the law is. Yet there is no dispute concerning the fact that Congress passed the act. (*d.*) Upon the trial of the case Whitaker objected to the introduction of testimony; "third, that the court has no jurisdiction of the subject-matter, it being a part of the domain of the United States and within the exclusive jurisdiction of the United States court and unsurveyed" (printed Record, page 21). In the opinion of the Nebraskan supreme court it is said by the learned Commissioner who wrote it, "the island in dispute and the *shore land* now owned by McBride and Kilgore were formerly embraced in the Fort Kearney military reservation; this was surveyed under the act of Congress of July 21, 1876, and, as heretofore stated, the surveyors were instructed by the Land Department of the General Government having that matter in charge to survey no islands found in the Platte river not containing 21 acres or more" (printed Record, page 88).

In the face of this showing, the contention of our friends that there was no reference to the act of Congress of July 21, 1876, until the petition for the writ of error must certainly fall to the ground. It was kept up right along afterwards, and there were many pages of earnest reference to it before the petition for the writ of error. We quote from the motion for the rehearing (printed Record, pages 95 and 96): "A rehearing should be granted for the reason that the opinion assumes that the defendant Whitaker may be ousted from his possession by two persons who are conceded by the opinion not to be the owners of the land in question, as the opinion does *not undertake to say that the legal title to the land is not in the United States. If the legal title to the land is in the United States, then only the United States can put Whitaker off the land.*

"A rehearing should be granted because the opinion does not determine who is the lawful owner of the land and without determining that fact provides for a judgment of ouster

against Whitaker. Now, neither McBride nor Kilgore can allege a title *superior* to the real defendant, Whitaker, against whom they conspire, and against whom they are attempting to operate as a pair of scissors. Before they could recover against Whitaker in an action of ejectment they would be compelled to prove their superior title. *If they obtained the superior title, it was from the United States, and the opinion expressly holds that they have acquired no title from the United States. It follows as a legitimate consequence that they have no title and therefore that they should not recover.*

"There should be a rehearing because under the opinion it is not determined that the *United States ever parted with its title to the land in controversy, and it is expressly determined that a controversy in the United States Land Office to obtain title to the land may still be maintained.*

"A rehearing should be granted because McBride and Kilgore have together conspired to *avoid the usual form of judicial procedure* and *have substituted an action to quiet title in place of an action of ejectment* and have deceived this court by their pretended hostility to each other, so that it has overlooked the *fact that the stipulation of McBride and Kilgore to confer jurisdiction ought not to stipulate the real defendant Whitaker out of his constitutional right to a trial under the usual forms of law and to a hearing before a jury.*

"A rehearing should be granted because the United States held the land in question *for the purpose of settlement* and Whitaker *settled on the land,* and now without determining that the United States *intended* to part with title to the land, and without determining that the United States is *unwilling* to *permit Whitaker's occupation and settlement,* the opinion ousts Whitaker from possession of the land, and *thereby defeats the purpose of the United States and the object of the law of Congress.*

"A rehearing should be granted because Whitaker as a citizen of the United States *had a right to settle upon the land,* and as a citizen of the United States he had a RIGHT TO HAVE

THE RULE PERTAINING TO THE GOVERNMENT SURVEY ENFORCED." In the supplementary motion for a rehearing it was, among other things, further alleged: "A rehearing should be granted because the statement of the learned Commissioner who delivered the opinion, that 'the fact that the plaintiff McBride and the defendant Kilgore each claim ownership of a part of the land in dispute, but cannot agree upon a division to be made thereof, does not in our opinion present any matter for the equitable interference of the court,' is a statement of the law and the action should have been dismissed by this court. The judgment of the district court dismissing the action was right.

"A rehearing should be granted because the facts found by the district court are not controverted by the learned Commissioner who delivered the opinion. The effect of his opinion is that a right may be founded upon a disregarded duty, and that such right may be taken from one who ought to be entitled to it and given to one who ought *not to be entitled to it*, and that the United States may thereby be deprived of distributing its own lands among its own citizens, *according to the laws of Congress and the merits of their respective claims*.

"A rehearing should be granted because the facts and the law are both as they were found by the trial court."

The motion for a rehearing was disposed of on the 13th day of October, 1902, and on the same date a mandate issued (printed Record, pages 98 and 99).

On the 6th day of November, 1902, counsel for Whitaker were given leave to file a motion for a rehearing and briefs in support of the same. Thereafter, on April 7, 1903, the mandate was recalled. On the 3d day of June, 1903, the second motion for a rehearing was overruled and a rehearing denied (printed Record, page 100). On the 4th day of June thereafter Whitaker moved the court as follows: "To so far modify the opinion as to declare that as between McBride and Kilgore on the one side and Whitaker on the other side

the land in controversy is not adjudged to be the property of McBride and Kilgore, and that there is no intention to declare that the title of the United States was ever divested or its ownership and control surrendered." (2) "That no mandate shall be sent to the district court of Buffalo county directing a judgment to be rendered against Whitaker which shall oust him from possession of the land pending his application to the General Land Office of the United States for leave to make a homestead entry on the same. In support of this application, appellee refers to copies of the papers filed by him in the United States land office at Lincoln, Nebraska, and states that he has applied to the General Land Office of the United States to have the land surveyed and to make a homestead entry of the same. And that he is a citizen of the United States and of the State of Nebraska and qualified to make such entry, and that he resides on said land with his wife and children, and that he has made valuable improvements thereon" (printed Record, page 101).

On the 20th day of June, 1903, the said motion was denied, and on that day there issued out of the said supreme court of Nebraska a mandate to the district court of Buffalo county (printed Record, page 102).

In the answer of the Whitakers it was, among other things, alleged: "First, that the court has no jurisdiction of the subject-matter involved in this case.

"Fourth, that said Geo. Whitaker is a citizen of the United States and of the State of Nebraska, and that he has never used his homestead right under the homestead laws of the United States.

"That he is of lawful age; that he is head of a family."

"Fifth, that this defendant, for the purpose of entering upon lands under the homestead land laws of the United States, has *entered upon and settled upon a tract of land unsurveyed and unoccupied.* * * * Eighth, that plaintiff never entered or proved upon said tract, nor has he any title right or interest by, under, or through any one to said tract; ninth,

that the said tract of land is owned by the United States Government and is subject to entry, and this defendant now lives on said tract under his right as a citizen under the homestead laws of the United States" (printed Record, pages 9 and 10).

It was further alleged that the United States Land Department could not be ousted by a State court from its administration of the law.

It was further alleged that McBride and Kilgore were *themselves trespassers, and that the United States owned the land, and that Whitaker's occupation of the land was lawful, and that no one could be heard to question his title except the United States.*

IV.

The learned commissioner of the Nebraska supreme court raises the question that the Government survey and plat are disputed by Whitaker. He discusses this question with learning and skill at considerable length. On page 88 of the printed record he says: "It is insisted that the rule in this State is firmly established, that it may be shown by evidence outside and independent of the Government plat of the survey that there was unsurveyed land left between the meander line of a grantee from the Government and the river bank to which he claims. And that if this fact is established he has no claim to the lands lying between the meander line and the bank, even though the Government plat of the survey shows the meander line to extend along the bank and the grant was made with reference thereto. The following cases are referred to as supporting this doctrine: Lammers *v.* Nissen, 4 Nebr., 245; Bissel *v.* Fletcher, 19 Nebr., 725; Bissel *v.* Fletcher, 27 Nebr., 582; Harrison *v.* Stipes, 34 Nebr., 431. We have examined these cases with great interest, and we are unable to see any analogy between the two first cited and the case at bar, nor

do we think that it was the intention of this court in the decision of these two cases to establish the rule that one claiming no title or right derived from the United States, *a naked trespasser*, could question or contradict the correctness of an approved plat of a Government survey of public lands." *Our answer to this argument is simply that the island was not surveyed, and that it is among a lot of other islands, including the islands occupied by McBride and Kilgore, and we claim that one island has no precedence over another island.*

At this point, however, we cannot refrain from calling attention to the peculiar manner with which the learned commissioner of the Nebraska supreme court closes the paragraph. He does not question the fact that the island in controversy does belong to the United States, but in substance he says, "*Even if this island does not belong to the lots and does belong to the Government, Whitaker may not tell about it. His mouth is closed. He cannot tell, because he does not own the island.* This argument could have been made against the "intrusive" settlers who settled upon the unsurveyed land in Kirwan *v.* Murphy, 23 Sup. Ct. Rep., 599. In that case the settlers went on to unsurveyed Government land which had been reported by the Government surveyors *as included in a lake.* In that case the false meander line included something more than twelve hundred acres of Government land represented to be covered by water. Whatever the cause may have been for the false meander line, the Government asserted title to its own and got it *at the end of a lawsuit which terminated in this court, but the Government was beaten all the way up until it reached this tribunal.* Settlers went upon this Government land, and by reason of representations made to the Land Department they succeeded in obtaining an order for a new survey. To restrain the making of this survey an action was brought by the appellees who owned lots coming down to what was represented to be the meander line of the lake. They sought to restrain Kirwan, the United States surveyor general for

the district of Minnesota, from making the survey. The lot-owners alleged their ownership of the lots, that the land was surveyed in June, 1876, and that the record of the survey had been approved by the United States surveyor general, and that a plat had been made and submitted to the Commissioner of the General Land Office, and that the surveying plat had been approved by the Government. It was further alleged that the survey and plat were inaccurate and did not correctly show the location and subdivisions of land and water in the township. It was claimed that the lake was actually much smaller than shown by the plat, and this was shown to be true. It was also claimed by the complainants that they purchased the land for value as extending to the lake, upon an estimate of the timber thereon, without knowledge of inaccuracy or fraud in the survey; that the consideration inducing such purchase was that the land bordered the lake, and that they owned other timbered lands, the timber from which could be brought to market by floating through the lake and its outlet through the St. Louis river, then the only means of transport; that in 1892 "certain intrusive settlers," knowing complainants' right and claim, petitioned for the survey of said lands, and that an order and contract therefor had been made and the survey was about to commence." It was said that a new survey of the lands would put the complainants to great and vexatious litigation in making proof of their title in actions against parties who were wholly irresponsible. It was also claimed that a large amount of the timber standing on the land belonging to the complainants would be destroyed in the making of the survey, and that the remainder would be exposed to damage by fire by reason of such resurvey. The prayer was that the surveyor general, his agents, attorneys, solicitors, and servants, should be restrained from entering into any contract for the survey of the lands described, or from surveying the same, or from taking any action for a survey of said lands, and that the

complainants should be protected in the use and enjoyment of such lands owned by them, extending to and including the shores "of said Cedar Island lake *and to the center of said lake.*" The appellants answered, admitting the making of the contract for the survey of the unsurveyed lands lying between the purported meander line and the actual body of the lake; "that in 1876 a contract was made with one Howe for a survey of the township and that he returned the field notes of a pretended survey from which a plat was made and approved, but averring that Howe surveyed only the exterior lines of the township, and in fact made no subdivision thereof or survey of the lands within it; that his field notes were false, fraudulent and fictitious, and the plat made therefrom was false and incorrect; admitting that the survey and plat were approved by the Commissioner of the General Land Office after complaint to him of its inaccuracy, but not until after withdrawal of the charge of inaccuracy by the person making it." A copy of the approved plat was before the court. The appellants denied that all of the lands were disposed of by the Government and alleged that about twelve hundred acres of land "were never disposed of and are still unsurveyed, lying between Cedar Island lake and the lots described;" alleged that "the land between the lake and the boundary line (Howe's meander) of the fractional lots is the twelve hundred acres of unsurveyed land referred to. The answer also denied that the timber would be destroyed or damaged in making the survey. Upon the trial the circuit court found that Henry S. Howe, a deputy surveyor of the United States, had made a contract with the Government for the survey, and that he made and filed what purported to be field notes of a survey from which a purported official plat was made and approved by the surveyor general of the United States for the district of Minnesota and by the Commissioner of the General Land Office, and that there was no evidence to indicate that there had been any actual survey

beyond the running and marking of the exterior boundary lines of the township. The lake was found to be a navigable, deep and permanent body of water having about nine hundred acres area instead of eighteen hundred acres, as described in the field notes and official plat. The conditions were found to be the same as in 1876. There was no evidence that any meander line of the lake was surveyed. The outlet of the lake was found to be at a different place from that described in the field notes and in the official plat. The evidence failed to show participation of the purchasers in any fraud or misconduct of the surveyor. The circuit court held that the lot owners owned the land to the actual waters of the lake and enjoined the survey. The court of appeals affirmed this decree. This court held in effect "that the intrusive settler was to be protected." It reversed the decree of the circuit court and the order of affirmance in the circuit court of appeals. *This court refused to be bound by the fraud of the surveyor. The district court of Buffalo county, in the first instance, directly followed the precedent set by this court. This court refused to hold that the fraud or neglect of a Government officer should deprive the United States of its property or the settlers who went on this land of their rights.* While the settlers were not before the court, THE ACTION OF THIS COURT PROTECTED THEIR RIGHTS. This court held that there was a right to survey between the *false meander line* and the *water line of the lake.* THIS IS A RECOGNITION OF THE RIGHT TO SURVEY THE ISLAND IN THIS CASE. In the case cited and in the case at bar it is the United States WHICH OWNS THE UNSURVEYED LAND. *If it was right to have a resurvey in the case cited, then it is right to have a resurvey in the case at bar.* It is the unsurveyed land of *the United States* that is to be surveyed *in both instances.*

V.

With the Nebraska supreme court the "intrusive-settler argument" was used to advantage in this case. The term used was "trespasser." In the opinion of the learned Nebraska Commissioner, the "trespasser" is denied the *opportunity to tell the truth*. If this principle should be applied to all the public lands of the United States, and had been so applied in the past, *then the whole West, and particularly the Pacific States, would be a wilderness or a desert*. In those States as in the case at bar, *settlement was invited*. If the first arrival can keep out all other settlers by fencing up the land and claiming it, then there is no such thing as distributing the public domain among actual settlers. All that our friends upon the other side claim is that they bought lots in the vicinity. That is a fact. All beyond it is sheer fabrication. Neither the *avarice* nor the *enterprise* of the *first arrival* should *permit him to deny a reasonable distribution of the bounty of the Government*.

VI.

Our friends endeavor to protect themselves behind a technical barrier. They say that we are disputing the Government plat, and they hold that up as a sacred sort of thing. To this we say that we do not dispute the plat. *We only say that the island is unsurveyed*. All parties agree that the island is unsurveyed. *If it is unsurveyed, then it is unsold* (Horne *v.* Smith, 159 U. S., 40; Kerwin *v.* Murphy, 23 Sup. Ct. Rep., 599).

The patent conveys only the land which is surveyed, and when it is clear from the plat that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it (Horne *v.* Smith, 159 U. S., 40; Lammers *v.* Nissen, 4 Nebr., 245). In the last-named case it appeared that between the meander line as run and the Missouri river

there was a tract of several hundred acres, and the court held that as that body of land *had not been surveyed* it did not pass by a patent of a lot which on the Government plat extended to the meander line. To the same effect is Glenn *v.* Jeferey, 75 Iowa, 20; Schloscer *v.* Hemphill (Iowa), 90 N. W., 842.

VII.

The United States Government does not guarantee the integrity of its officers or the validity of their acts. They are but the servants of the law, and if they depart from its requirements the Government is not bound (Moffat *v.* United States, 112 U. S., 24).

Our friends say that the courts have no jurisdiction to correct a survey (Cragin *v.* Powell, 128 U. S., 691). To this we say, that may be true, and if it is, then *they cannot by a decree give effect to a survey which never was made.* In this case the island never was surveyed, and therefore the court must not say *by a decree that it was surveyed.* If the courts are to be strictly kept within the range of judicial action alone, then they must not under the guise of judicial action declare that acts are performed *which have not been performed and which are purely political.* If the political act to be done in this case is to make a survey, and it has not been done, then it is not for the court to say that it will declare that the political act of making the survey *has been performed, although it has not been performed.* All the parties concede that the *island has not been surveyed.* This being true, it is not for the court to say that *it has been surveyed.* The testimony is that the pretended meander lines *were not run.* In the face of this testimony it is not for the court to say that *they were run.* But, in any event, the island itself is unsurveyed and there is no pretense of surveying it.

In Horne *v.* Smith, 159 U. S., 40, the meander was actually run along a bayou falsely indicated upon the field notes as

"Indian river." It was claimed that the fractional lot must be extended to the river. This is like the contention in the case at bar, *that the island which is unsurveyed belongs to lots which are separated from it by two separate and distinct streams.* In the case cited, the court held, pages 43 and 44, "In the first place the area of the lots is given, and when that area is stated to be 170 acres it is obvious that no survey was entered of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof in sections 22 and 27. Again, the distance from the east line of the section to the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26 and manifestly that was not intended to include land in 22 and 27."

If the same argument is to be used in the case at bar, then it would seem to be very apparent that the island is not to be considered as belonging to the lots. Taking the amount of land shown by the lots, there is surveyed in the southeast quarter of section 12, 131.09 acres. In lot 8 there are 29.70 acres, in lot 6, 34.40 acres; in lot 7, 27.90 acres; in the northwest quarter, 40 acres, making a total of 131.09 acres. This would leave in the island within the quarter section 28.90 acres to be surveyed. This is upon the theory that the quarter section, if surveyed, would contain 160 acres. Touching this same matter this court said in Niles *v.* Cedar Point Club, 175 U. S., 300: "The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for or than the Government was

offering for sale." *If this rule is to be applied, then McBride and Kilgore have no sort of legal claim to the island. The plats introduced do not call for the island.*

VIII.

We desire to call the attention of the court to the fact that the island is marked on the plat contained between pages 74 and 75 as containing "about 18 acres." This is not a part of the plat as originally made by the Government. The words and figures "about 18 acres" were marked in by Mr. C. B. Channel long after the original survey was made (Printed Record, page 64).

IX.

In Mitchell *v.* Smale, 140 U. S., 406, the court intimates the effect of a mistaken or fraudulent meander line. It says cases have happened in which by mistake the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government.

In French Glenn Live Stock Co. *v.* Springer, 185 U. S., 47, the court held that the making of a meander *has no certain significance.*

In St. Paul R. R. Co. *v.* Schurmier, 7 Wall., 272, the court held that the meander line is not always a boundary.

In Granger *v.* Swart, 1 Woolw., 88, Justice Miller, in his charge to the jury, among other things, said: "If between the meander line, which by the Government survey was made one of the boundaries of the land sold to Walker and the bank of Rock river and shore of Lake Koshkonong, there was at that time a body of swamp or waste land or flats on which timber and grass grew, and horses and cattle could feed, and hay be cut, then the patents to Walker did not cover this land, but were confined to the actual limit of said meander

line." We think it proper to apply this sort of rule to the island in question. The *meander line had no business to cross the channel.* At most it could only *indicate where the channel was.* There were *two meander lines,* seemingly to indicate the north channel and the south channel. At most they only pointed to the *actual channels* which they respectively were *supposed* to be made for. According to both rules, the rule applying to meander lines and the rule applying to *unsurveyed lands,* the island in question *was not sold and was not conveyed.*

In Glenn *v.* Jeffrey, 75 Iowa, 20, the field notes of the survey called for the Missouri river, but in fact only reached a bayou some distance *short* of the river. The court said: "There was no controversy as to facts. It is true that the Government plat and field notes described the meander line as being near the Missouri river and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of the meander line being along the river it was run along a bayou some distance from the river." In that case the court held that the land in question could not be regarded as an accretion, because it existed *as it now does when the survey was made.* In that case the land was in fact never surveyed by the Government, and was never sold or conveyed to the plaintiff. The court further held that the lower court properly directed the jury to find for the defendant.

In Grant *v.* Hemphill, 92 Iowa, 218, the court held: "A riparian proprietor is one who owns land bounded upon a water-course or lake. The evidence in this case shows that there was not at the time of the Government survey, and is not now, any body of water east of the meander line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner. * * * It is well understood that a meander line is not regarded as a line of boundary. It is supposed to be along the shore of a body of water and to follow the windings of the stream or

lake and the sinuosities of the bank. In such case and where it appears that the Government intended to sell all the land to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant to the water's edge (Kraut *v.* Crawford, 18 Iowa, 549). *But no such condition is found under the evidence in the case at bar. There is not and has not been any body of water upon which to locate a meander line.*"

The court then quoted the rule in the Schurmier case, that a meander line along a body of water is not a boundary, and then held: "That all of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title except through the regular methods adopted by the General Government for the disposition of the public lands." In support of this principle we refer to Fuller *v.* Shedd, 161 Ill., 462; Barnhart *v.* Ehrhart (Oregon, 54 Pac., 195).

We think the rule is that where there is a meander line not far from a stream that it indicates and points to the stream, but if there is no body of water there, then the meander line itself becomes a boundary. Under this rule the island in question is the property of the United States, subject to such right as the plaintiff in error, Geo. S. Whitaker, may have. *It never became the property of McBride and Kilgore.*

Horne *v.* Smith, 159 U. S., 40; 15 Sup. Ct., 988; 40 L. Ed., 68; Niles *v.* Cedar Point Club, 175 U. S., 300; 20 Sup. Ct., 124; 44 L. Ed., 171; Fuller *v.* Shedd, 161 Ill., 462; 44 N. E., 286; 33 L. R. A., 146; 52 Am. St. Rep., 380; Whitney *v.* Lumber Co., 78 Wis., 240; 47 N. W., 425; Grant *v.* Hemphill, 92 Iowa, 218; 59 N. W., 263; 60 N. W., 618; Live Stock Co. *v.* Springer, 35 O. R., 312; 58 Pac., 102.

X.

While it is true that the courts may not oust the Land Department of its jurisdiction, yet it is proper for the courts to declare the law in all cases which may properly rise touching the disposition of the public domain. Whenever there is a question as to whether title to land once the property of the United States has passed from the United States, such question must be resolved by the laws of the United States (Wilcox *v.* Jackson, 13 Pet., 498).

XI.

We do not necessarily reach this question, but where one claims that he is entitled to riparian rights he must first show that he owns the shore (Bates *v.* Illinois Central R. R. Co. (1 Black, 204); Niles *v.* Cedar Point Club, 175 U. S., 300; Lamprey *v.* State, 52 Minn., 198; Grant *v.* Hemphill, 192 Iowa, 218).

The district court of Buffalo county in its first judgment, dated June 13, 1899, finds that there was no survey of this island, because the language of the decree is: "As a matter of law the court concluded that said island should have been surveyed by the Government surveyor" (printed Record, page 17).

XII.

All parties agree that the island in controversy has not been surveyed. The solitary question, then, is whether the occupation of it by Whitaker and his wife was lawful as to McBride and Kilgore. That involves a consideration of the act providing for the settlement and survey and sale of the Fort Kearney reservation and the homestead laws of the United States and the laws of the United States pertaining to surveys. Our adversaries say that there is no Federal

question in the case. Do they mean to tell us that the State courts have exclusive jurisdiction to determine these things, and that their judgment is final? If the United States may not construe its own land laws and its own laws pertaining to surveys, and its own laws concerning the sale and disposal of its own lands, it would seem that the General Government has been eliminated from the exercise of governmental functions. The determination of these questions must be resolved by the laws of the United States (Wilcox *v.* Jackson, 13 Pet., 498).

XIII.

The United States Government ought to be allowed to determine two things. It ought to be allowed first to determine whether it will permit Whitaker to occupy this island, which is conceded to belong to it. Second, it ought to be allowed to determine whether it will accept Whitaker as a homesteader. All parties concede that the island is unsurveyed; that the United States Government may assert ownership and possession at any time. This being the case, by what right does the State court assume to take the land away from Whitaker and his wife and to give it to McBride and Kilgore? The United States, being satisfied with Whitaker for six years last past, may be presumed to be friendly to him and willing for his occupation of the island.

XIV.

How would this case be if there had never been any attempt at a survey of the Fort Kearney military reservation? Could McBride and Kilgore, who never settled upon the land, sue the United States for specific performance for a contract which was never made? For the reason (1) that this island was never surveyed, and (2) that McBride and Kilgore did not settle upon it, are they in any condition to

claim title to it? If so, upon what theory do they base their claim? The learned supreme court commissioner has written the syllabus in the case, which is supposed to cover the points decided. In the first point contained in the syllabus he uses the term "grants of land *bounded upon a river.*" Is a grant of land upon one of twenty inside channels of a river "bounded upon a river"? In the same point he speaks of the right of "proprietors of land *adjoining public rivers.*" Is the owner of land on an *inside* channel of a river the proprietor of land *adjoining a river?* In the second point he speaks of a grant of land upon a non-navigable river which "shows a meander line along the river bank." Is a meander line along an *inside* channel a meander line along a *river bank?* As we understand it, THE BANKS OF A RIVER ARE ON THE OUTSIDE OF THE RIVER. THEY ARE NEVER ON THE INSIDE. On page 86 of the printed Record the opinion speaks of "*shore lands* lying opposite." On page 88 of the printed Record the opinion speaks of "the island in dispute and the *shore lands* now owned by McBride and Kilgore." We submit that an examination of the opinion shows that its learned author did not understand that McBride and Kilgore *were themselves islanders. He supposed that they owned outside lands coming down to the shore of the river.* Apparently he did not look at either of the maps contained in the printed record. The first map, which is between pages 74 and 75, shows that lot 8, belonging to McBride, extends *up north* from the south section line of section 12 to the *south channel*, and that lots 6 and 7, belonging to Kilgore, extend *down south* from the *north line of the quarter section to the north channel.* This plat also shows that the said stream known as the north channel of Mosquito channel, begins west of the west line of section 12 about a quarter of a mile and runs in a northeasterly direction until it crosses over both the east and the west lines of the said southeast quarter of 12, and then continues northeast to where it joins the south channel of the said "Mos-

quito channel" and nearly a quarter of a mile northeast of the said southeast quarter of 12. This plat also shows that the *south channel* begins south and west of the southeast quarter of 12, and then runs north on east through the southeast quarter into the next section, being section 7, where it joins the north channel. The plat shows that the lots owned by McBride and Kilgore are *parts* of islands, and that they *are not* on the bank of the river, but *away inside*, so that McBride and Kilgore are not in any position to claim that they are *riparian or shore owners*. They are simply *island owners*. At most McBride can only own to the *center* of the *single* channel *next* to *his lot*. At most Kilgore can only own to the *center* of the *single* channel *next* to *his lots*.

XV.

The certificate of the chief justice of Nebraska concerning the Federal questions involved and determined is a carefully prepared statement, based upon the pleadings and the evidence and the contentions of the trial, the opinion in the case, and the rulings of the court in determining whether that opinion should stand and be enforced. It was only signed after most careful examination.

XVI.

The learned judge of the district court of Buffalo county who rendered the first judgment in the case, and rendered it in favor of Whitaker, was *not deceived by the calling of two channels by one name*. He finds: "That said tract of land was within the *extreme channels of the Platte river*." He also finds that the tract in controversy was "*entirely surrounded by certain channels of the Platte river*" (printed Record, page 16). He also finds that said channels "are substantially as shown by the plaintiff's plat." He also finds "that the *south line* of said lots 6 and 7 is the channel line as shown in Exhibit

"A," and that the *north line* of said lot 8 is the channel bounding it on the *north*, as shown in said Exhibit "A" (printed Record, page 17).

XVII.

This particular case is not of great magnitude; it only involves the welfare of one humble citizen. To him it means the opportunities of a home. But there is a considerable number of these islands. Many of them are occupied just as this one has been occupied. The Land Department seems to be afraid of the Nebraska supreme court, and it does not seem to understand the decision of this court in Indiana and Grand Rapids R. R. Co. *v.* Butler, *supra*. If this court shall lay down the law covering this question, and if it is favorable to the settlers, there is no question but that they will be protected by speedy action upon the part of the Land Department. There is a much greater acreage at stake in this case than in the case of Kirwan *v.* Murphy, 23 Sup. Ct. Rep., 599. We do not mean in this *one* case, but we mean included in the unsurveyed islands of the Platte river *lying within the Fort Kearney military reservation.*

In Tarpey *v.* Madsen, 178 U. S., 215, this court held that the right of one who has actually occupied public land with an intent to make a homestead or pre-emption entry cannot be defeated by the mere lack of a place in which to make a record of his intent. The law deals tenderly with one who in good faith goes upon public lands with a view of making a home thereon. In that case Justice Brewer, delivering the opinion of this court, said: "Where the accident or omission is not the fault of the party, but of the Government or some officer of the Government, such accident or omission cannot defeat the right of the individual." If we apply the doctrine laid down in this case to the case at bar, the mere failure of the Government surveyor to survey the island can deprive Whitaker of no right, and it becomes a

jurisdictional duty of this court to protect his possession. In the case cited, Justice Brewer refers with approval to Lamb *v.* Davenport, 18 Wall., 314, where a settlement antecedent to any act of Congress was sustained. He quotes Justice Miller, who says: "And though these rights or claims rested on no statute or any positive promise, the general recognition of them in the end by the Government and its disposition to protect the meritorious, actual settlers, who were the pioneers of emigration in the new Territories, gave a decided and well-understood value to these claims."

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